

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of March, two thousand and ten.

PRESENT: PIERRE N. LEVAL,
CHESTER J. STRAUB,
RICHARD C. WESLEY,
Circuit Judges.

GEORGE BELL,

Petitioner-Appellant,

-v.-

08-3539-pr

ROBERT E. ERCOLE, Superintendent, Green
Haven Correctional Facility,

Respondent-Appellee.

1 FOR APPELLANT: KATHERYNE M. MARTONE, The Legal Aid
2 Society, Criminal Appeals Bureau, New
3 York, NY.
4

5 FOR APPELLEE: LINDA CANTONI (John M. Castellano, *on the*
6 *brief*), *for* Richard A. Brown, District
7 Attorney, Queens County, Kew Gardens, NY.
8

9 Appeal from the United States District Court for the
10 Eastern District of New York (Korman, J.).
11

12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
13 **AND DECREED** that the June 20, 2008 order of the United
14 States District Court for the Eastern District of New York
15 is **VACATED** and **REMANDED**.

16 Petitioner-Appellant George Bell appeals from an order
17 of the United States District Court for the Eastern District
18 of New York (Korman, J.), which denied his petition for a
19 writ of habeas corpus pursuant to 28 U.S.C. § 2254. See
20 *Bell v. Ercole*, No. 05 Civ. 4532, 2008 WL 2484585 (E.D.N.Y.
21 June 20, 2008). We presume the parties' familiarity with
22 the underlying facts, the procedural history, and the issues
23 presented for review.

24 Petitioner was convicted by a jury of, *inter alia*,
25 first-degree murder relating to a double homicide and
26 attempted robbery that occurred in Queens, New York on
27 December 21, 1996. The evidence at trial included, among
28 other things: (1) signed and videotaped confessions by

petitioner; (2) testimony from Gary Turnbull, a witness situated near the crime scene at the time of the homicides who later identified petitioner in a lineup; and (3) testimony from a "jailhouse informant" named Reginald Gousse, who cooperated with the prosecution and testified that petitioner confessed to the homicides while he was incarcerated awaiting trial. The matter was tried as a capital case, but the jury declined to impose the death penalty. Petitioner was ultimately sentenced to life in prison without the possibility of parole.

Petitioner raised four principal contentions in his federal habeas petition. First, he argued that unauthorized crime-scene visits by two jurors during the trial injected extra-record evidence into the deliberations that violated the Sixth Amendment. Second, petitioner asserted that erroneous evidentiary rulings at trial abridged his Sixth Amendment right to present a complete defense. Third, petitioner argued that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny by failing to disclose: (1) the full extent of its cooperation agreement with Gousse; and (2) that an individual named Jason Ligon had recanted his confession to participating in the

1 homicides. Finally, petitioner contended that the
2 prosecutor committed misconduct during his trial summation,
3 which violated his due process rights.¹

4 The district court rejected each of these arguments,
5 and denied petitioner's request for an evidentiary hearing
6 pursuant to 28 U.S.C. § 2254(e)(2). With respect to the
7 jurors' crime-scene visits, the district court held that
8 "[t]he jury's exposure to extra-record information . . . was
9 harmless under any standard." *Bell*, 2008 WL 2484585, at *8.
10 As to the trial court's evidentiary decisions, the district
11 court found that the effect of the rulings did not warrant
12 habeas relief, whether considered individually or
13 collectively. See *id.* at *25. The district court was also
14 unpersuaded by petitioner's *Brady* arguments. See *id.* at

¹ In addition, petitioner argued that: (1) the trial court's reasonable doubt instruction to the jury unconstitutionally diluted the prosecution's burden of proof; and (2) the trial judge violated petitioner's due process rights by refusing to afford his counsel an opportunity to be heard before the judge responded to a jury request for a read-back of the trial transcript. The district court rejected both of these arguments and did not grant a certificate of appealability as to either argument. *Bell*, 2008 WL 2484585, at *35. Petitioner's motion to expand the certificate of appealability to include these two arguments was denied on October 10, 2008 by a previous three-judge panel of this court. See Dkt. No. 08-3539-pr, Order of Oct. 10, 2008.

1 *27. Finally, the district court rejected petitioner's
2 challenges to the prosecutor's summation, relying chiefly on
3 the "invited response" doctrine, *United States v. Young*, 470
4 U.S. 1, 12-14 (1985), and a curative instruction issued by
5 the trial court during closing arguments. See *Bell*, 2008 WL
6 2484585, at *31.

7 The district court granted petitioner a certificate of
8 appealability as to these four holdings, each of which
9 petitioner challenges in this appeal. See *id.* at *35. Our
10 standard of review is well-settled; we review the district
11 court's decision *de novo* and its fact findings for clear
12 error. *E.g.*, *Garraway v. Phillips*, 591 F.3d 72, 75 (2010).
13 Similarly established are the broad standards governing a
14 district court's consideration of a habeas petition pursuant
15 to 28 U.S.C. § 2254 where, as here, the petitioner's claims
16 were adjudicated on the merits in the state courts. *E.g.*,
17 *Hawkins v. Costello*, 460 F.3d 238, 242-44 (2d Cir. 2006).
18 Within the broader framework for review established by the
19 Antiterrorism and Effective Death Penalty Act of 1996
20 ("AEDPA"), however, petitioner's myriad arguments present a
21 complicated series of analytical questions. For the reasons
22 set forth below, because we are unsatisfied that the

1 district court properly addressed these issues, we vacate
2 the order denying the petition and remand for further
3 proceedings.

4 Our principal concern lies with the manner in which the
5 district court resolved petitioner's challenges to the trial
6 court's evidentiary rulings. In order to determine whether
7 the effect of state-law evidentiary rulings can give rise to
8 an "unreasonable application of [] clearly established
9 Federal law," 28 U.S.C. § 2254(d)(1), a district court must
10 first "start with 'the propriety of the trial court's
11 evidentiary ruling.'" *Hawkins*, 460 F.3d at 244 (quoting
12 *Wade v. Mantello*, 333 F.3d 51, 59 (2d Cir. 2003)). A trial
13 court does not necessarily violate AEDPA by misapplying its
14 state's evidentiary law, but "[t]he inquiry . . . 'into
15 possible state evidentiary law errors at the trial level'
16 assists . . . in 'ascertain[ing] whether the appellate
17 division acted within the limits of what is objectively
18 reasonable.'" *Id.* (alteration in original) (quoting *Jones*
19 *v. Stinson*, 229 F.3d 112, 120 (2d Cir. 2000)).

20 In the context of challenged evidentiary rulings, the
21 second analytical step depends on the district court's
22 decision regarding whether the evidentiary ruling was

1 erroneous as a matter of state law. If it was, then the
2 next question for the district court is "whether 'the
3 omitted evidence [evaluated in the context of the entire
4 record] creates a reasonable doubt that did not otherwise
5 exist.'" *Justice v. Hoke*, 90 F.3d 43, 47 (2d Cir. 1996)
6 (alteration in original) (quoting *United States v. Agurs*,
7 427 U.S. 97, 112 (1976)). If, however, the challenged
8 ruling was correct under state law, then the district court
9 must ask whether the evidentiary rule that was applied is
10 "arbitrary or disproportionate to the purposes it is
11 designed to serve." *Hawkins*, 460 F.3d at 245.

12 The district court failed to hew to this framework,
13 which obscures our review of its decision. The court
14 identified eleven categories of evidentiary rulings
15 challenged by petitioner.² Within those categories, it is

² The categories of challenged rulings relate to the following evidence: (1) direct testimony and cross-examination relating to posters offering a reward for information about the homicides, see *Bell*, 2008 WL 2484585, at *10; (2) cross-examination of Assistant District Attorney Neil Morse regarding his recollection of petitioner's lineup, *id.* at *11; (3) testimony from petitioner's mother regarding his whereabouts on the morning of the homicides, *id.* at *12; (4) an audio-taped 911 telephone call by an eyewitness who testified at trial, *id.* at *13; (5) excluded expert testimony relating to false confessions coerced by non-physical means, *id.* at *14; (6) testimony relating to petitioner's I.Q. and educational history, *id.* at *18; (7)

1 not clear how many state-law errors the district court
2 found. For example, with respect to the trial court's
3 exclusion of testimony from petitioner's mother relating to
4 his whereabouts on the morning of the homicides, the
5 district court found that there was "*arguably* some merit to
6 the argument that the trial judge abused his discretion."
7 *Bell*, 2008 WL 2484585, at *12 (emphasis added). Similarly,
8 as to the exclusion of testimony relating to petitioner's
9 educational history, the district court reasoned that "[i]t
10 is not clear from the record why this evidence was excluded
11 at trial." *Id.* at *18. However, with respect to each of
12 the challenged rulings, it was incumbent upon the district
13 court to address the propriety of the trial court's
14 decision and then to analyze the effect of that decision
15 under the framework described above. In these respects, we
16 find the district court's analysis lacking. Therefore, one

cross-examination of Detective Louis Pia relating to his
experience in law enforcement, *id.* at *20; (8) testimony
from Mendez Collier regarding his observations of petitioner
while he was at the police precinct after they were
arrested, *id.* at *21; (9) testimony relating to the
investigation and arrest of Jason Ligon, *id.* at *22; (10)
testimony and cross-examination relating to the sentencing
exposure of Reginald Gousse, *id.* at *23; and (11) testimony
and cross-examination relating to Gousse's access, while in
prison, to petitioner's court documents and case-related
press clippings, *id.* at *24.

1 of the purposes of our remand is to permit the court to
2 properly analyze individually the challenged rulings.

3 We are also unsatisfied with the district court's
4 analysis of the collective effect on petitioner's trial of
5 the challenged evidentiary rulings. Although the district
6 court noted that petitioner's argument "relies on the[]
7 cumulative effect" of these rulings, *id.* at *9, the court
8 devoted the vast majority of its discussion to a somewhat-
9 ambiguous analysis of the individual impact of each
10 decision. After performing that analysis, the court held
11 that it could not "conclude on this record that the whole is
12 greater than the sum of its parts" because:

13 Some of the erroneous rulings were not significant
14 in terms of their impact on the trial. Others
15 were harmless because other evidence was admitted
16 that made up for the evidence that was excluded,
17 and others were ultimately overcome by the
18 corroboration provided by the cumulative effect of
19 other evidence in the case. Moreover, not all of
20 the rulings were erroneous, even though I rejected
21 petitioner's arguments on the alternative ground
22 that the errors were harmless.
23

24 *Id.* at *25.

25 Here again, we find ourselves unable to analyze the
26 district court's conclusion because of the vagueness in its
27 reasoning. The first shortcoming of this analysis results
28 from the court's failure to specify which of the following

1 self-identified classes each ruling fell into: (1)
2 "erroneous rulings" that did not have a "significant . . .
3 impact on the trial"; (2) errors rendered harmless "because
4 other evidence was admitted that made up for the evidence
5 that was excluded"; (3) errors that were "ultimately
6 overcome" by the "cumulative effect of other evidence in the
7 case"; or (4) rulings that were assumed to be erroneous in
8 order to proceed to harmless error analysis. *Id.* The
9 district court also failed to consider whether the
10 prosecutor's summation "sharpened the prejudice" that
11 resulted from the challenged rulings. *Jenkins v. Artuz*, 294
12 F.3d 284, 294 (2d Cir. 2002). Therefore, the second purpose
13 of our remand is to allow the district court to clarify its
14 analysis of the aggregate impact of the challenged
15 evidentiary rulings on petitioner's trial.

16 One final aspect of the district court's ruling
17 requires further analysis upon remand. Several times in the
18 decision, when performing harmless error analysis, the
19 district court suggested that the jury was privy to the
20 "confession of an accomplice." *See, e.g., Bell*, 2008 WL
21 2484585, at *11 ("[I]t was unlikely that the jury would
22 discredit Turnbull's identification as a lie in order to

1 obtain a reward, when [petitioner] had previously confessed
2 and *had been implicated in a confession of an accomplice.*"
3 (emphasis added)); *id.* at *18 ("[A]s a practical matter, it
4 is virtually impossible for a defendant to succeed in
5 persuading a jury that his confession, corroborated by an
6 eyewitness identification, *the confession of an accomplice,*
7 and by other circumstantial evidence, was untrue without
8 taking the stand and explaining why he confessed." (emphasis
9 added)). The accomplice confession referenced by the
10 district court was not explicitly presented to the jury, as
11 it would have violated *Bruton v. United States*, 391 U.S. 123
12 (1968). See *Bell*, 2008 WL 2484585, at *2 n.1. However, the
13 district court took the view that Lieutenant Nevins'
14 testimony conveyed to the jury an "implicit" accusation by
15 Mark Bigweh against petitioner. On remand the district
16 court should clarify the evidentiary basis for the
17 "confession of an accomplice" that it referenced, and
18 describe the weight that this "confession" received in its
19 harmless error analysis.

20 Moreover, if the district court continues to rely on
21 the accomplice confession in its harmless error analysis, it
22 should address the following. Had the prosecution attempted

1 to adduce evidence that Bigweh confessed and named Bell as
2 an accomplice, this evidence would have been objectionable
3 as hearsay and under *Bruton*. Upon reviewing the record,
4 insofar as it was cited by the district court, it is
5 debatable whether there was a basis for such objections. On
6 the one hand, it could be argued that the prosecution only
7 elicited testimony from Lieutenant Nevins that Bigweh "had
8 information," Tr. 11690, and helped the police find Bell,
9 Tr. 11659-68. In its harmless error analysis, however, the
10 district court seems to have reasoned that the jury heard
11 evidence of an accomplice's confession implicating Bell, to
12 which Bell failed to object. See, e.g., *Bell*, 2008 WL
13 2484585, at *2 n.1, *11. It might be argued that, in doing
14 so, the district court: (1) considered evidence that the
15 prosecution could not – and, arguably, did not – elicit
16 under *Bruton*; and (2) faulted petitioner for failing to
17 raise an objection to evidence that was not admitted at
18 trial. On the other hand, one might argue that the jury did
19 hear an implicit accusation by an accomplice implicating
20 Bell, to which defense counsel failed to object, because the
21 jury heard that: (1) Bigweh had information about the
22 crime, Tr. 11690, and was involved in the crime, Tr. 11829,

1 11964-65; (2) Detective Nevins, as a result of meeting with
2 Bigweh, convened a "tactical meeting" to "apprehend an
3 individual," Tr. 11659; (3) Detective Nevins then staked out
4 Bell's home, Tr. 11662, "apprehended" Bell, "[p]laced him
5 against the wall," "frisked him," and "handcuffed him," Tr.
6 11669; and (4) Bell "was arrested as a result of a co-
7 defendant of his by the name of Bigweh" and was thereafter
8 upset "that Bigweh had ratted him out," Tr. 12092-96. If
9 the district court adheres to its harmless error analysis
10 based on the accomplice confession, it should address this
11 issue as well.

12 * * *

13 In sum, on remand the district court is directed to:

14 (1) Analyze each of the challenged evidentiary
15 rulings under the analytical framework set forth
16 in *Hawkins v. Costello*, 460 F.3d 238, 242-44 (2d
17 Cir. 2006);

18
19 (2) Discuss more thoroughly whether the collective
20 impact of the challenged evidentiary rulings –
21 considered together with the prosecutor's
22 summation – warrants habeas relief; and

23
24 (3) Clarify the evidentiary basis for the
25 "confession of an accomplice" it referenced, e.g.,
26 2008 WL 2484585, at *11, *18, as well as the
27 weight this "confession" received in its harmless
28 error analysis.

29
30 In undertaking this analysis, the district court is of

1 course free to develop the record further using its
2 discretion under 28 U.S.C. § 2254.

3 Accordingly, for the foregoing reasons, the judgment of
4 the district court is hereby **VACATED** and **REMANDED** for
5 further proceedings consistent with this order. Within ten
6 days of the district court's filing of its written response
7 to this order, either party to the proceedings may restore
8 the case to this panel by giving notice to the Clerk of the
9 Court. *See United States v. Jacobson*, 15 F.3d 19, 22 (2d
10 Cir. 1994).

11 FOR THE COURT:
12 Catherine O'Hagan Wolfe, Clerk
13
14